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FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 123

MRS. FAY M. HOSHMAN, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS OF RUSSELL M. HOSHMAN,

Petitioner,

versus

ESSO STANDARD OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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MRS. FAY M. HOSHMAN, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS OF RUSSELL M. HOSHMAN,

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BRIEF FOR RESPONDENT IN OPPOSITION

May it please the Court:

OPINION BELOW

This is a damage suit. Petitioner's husband was fatally injured during the course of his employment by respondent. The District Court, without opinion, granted respondent's motion to dismiss based on the exclusiveness of the Louisiana workmen's compensation remedy and the Circuit Court of Appeals for the Fifth Circuit affirmed (263 F2d 499).

JURISDICTION

For jurisdiction, petitioner invokes 28 U.S.C., Section 1254, which as here applicable, provides,

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

This is a diversity case. It involves solely the question of the exclusiveness provisions of the Louisiana Workmen's Compensation statute as applied to the allegations of the complaint. It is of interest only to the litigants. There is nothing in the petition to bring it within the scope of Rule 19 of this Honorable Court: "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." (*N.L.R.B. v. Pittsburgh Steamship Company*, 340 U.S. 498, 502.) Petitioner not only fails to show any conflicts in decisions below on the question presented but fails to show any decisions, state or Federal, supporting petitioner's position. Additionally, the Federal question of denial of trial by jury was not mentioned in the specification of errors in the appeal to the Fifth Circuit nor raised, other than in the prayer for jury trial, in the District Court.[1]

1. The specification of errors in petitioner's brief to the Court of Appeals for the Fifth Circuit was:

   1. The trial court erred in granting defendant's motion to dismiss and rendering a judgment rejecting complainant's demand and dismissing her suit with costs.

Under the established criteria, this Court is without jurisdiction.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Louisiana Revised Statutes, Title 23, Section 1032:

"Exclusiveness of rights and remedies; employer's liability to prosecution under other laws.

"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relations.

"Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

Federal Rules of Civil Procedure—Rule 8(a) Claims for Relief:

"A pleading which sets forth a claim for relief, whether an original claim, counter-claim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that

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2. The trial court erred in concluding that the complainant's remedy was exclusively provided by the Louisiana Workmen's Compensation Act and in concluding that she and her minor children did not have a cause of action in accordance with Article 2315 of the Revised Civil Code of Louisiana.

(Petitioner's brief to the Court of Appeals, p. 3.)

the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

QUESTION PRESENTED

The petition sets out five questions. However, the basic question, of which petitioner's phrasings are variants, is the exclusiveness for the claim presented of the remedy provided by the Louisiana Workmen's Compensation statute. For a Federal question, petitioner maintains that dismissal of her claim on motion has denied her the right to trial by jury.

STATEMENT

This diversity suit is a damage action for the death of petitioner's husband during the course of his employment as a pipefitter at respondent's Baton Rouge, Louisiana, oil refinery. The complaint is reproduced as Appendix E of the petition (Petition p. 32). The defense, advanced on a motion to dismiss and sustained below, is the exclusiveness of the remedy provided by the Louisiana Workmen's Compensation statute. The affirming opinion of the Fifth Circuit Court of Appeals is reproduced as Appendix A of the petition. (Petition p. 23)

ARGUMENT

I.

The Decision Below Is Correct.

The opinion below is by Judge John Minor Wisdom, an eminent Louisiana lawyer. The case turns solely on the appli-

cation of the Louisiana law. This Court, in question of local law, gives deference to the decision of the lower Federal courts. (*Williams v. United States*, 341 U.S. 97, 100; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204-205.)

II.

The Substantive Law of Louisiana Does Not Permit This Action to Be Brought.

Petitioner assigns as reasons for granting of a writ of certiorari (1) that the substantive law of Louisiana permits this action to be brought and (2) that the Fifth Circuit erred in judging the sufficiency of the allegations of the complaint by applying the tests used by the Louisiana Courts instead of the criteria embodied in the Federal Rules of Civil Procedure. We notice these in order.

Petitioner seeks to avoid the exclusiveness of the compensation remedy by alleging, partly in the complaint and partly in memorandum to the trial court, in briefs to the Fifth Circuit and in her petition here, facts which are said to constitute fraud. As we will show, all of these facts, both in the complaint and elsewhere, are in truth but allegations of negligence and the fraud is a conclusion which petitioner's counsel has drawn.

The complaint alleges that petitioner's husband, during the course of his employment by respondent, was electrocuted while guiding a pipe which was being moved by a crane. This accident, according to the complaint, "was caused by the gross and wanton negligence of the employees of respondent in failing to provide safeguards to the said Russell M. Hoshman; in failing to maintain proper lookout for the operation of said

crane, and in ordering the said Russell M. Hoshman to hold onto said pipe, well knowing the close proximity of said high-powered line and in failing to warn the said Russell M. Hoshman of the danger involved." (Paragraph 9, Petition, p. 33)

The next paragraph of the complaint says the respondent concealed "such facts" from petitioner's husband and that her husband "was not informed of the extra hazards connected with his employment and was not informed of the unsafe place and conditions of his employment and he was not informed that no precautions or provisions were made to protect him." (Petition page 33-34)

Then the complaint draws the conclusion: "that the concealment of such extra hazards by his employer constituted fraud, vitiating the presumed agreement of the deceased to be governed by the compensation laws of the State of Louisiana." (Petition p. 34)

The facts alleged are negligent acts. The "gross and wanton negligence" and the so-called fraud are conclusions from these facts. The alleged facts and not the attempted conclusions are the only admissions for the purpose of the motion to dismiss. (*Moore's Federal Practice*, 2nd Ed. Vol. 2, Section 12.08, p. 2244.) If to these facts in the complaint there are added the allegations in petitioner's memorandum to the trial court and in the petition here that respondent had removed lookouts or flagmen prior to the accident, the allegations are still only of negligence.

> "Negligence is the failure to observe, for the protection of another's interests, such care, protection, and vigilance as the circumstances justly demand, and the want of

which causes him injury." It is the failure to observe the care and skill which the situation demands. See "Negligence," 28 Words & Phrases, Perm. Ed., p. 334 (as quoted in *State v. Vinzant*, 7 So. (2d) 917, 922, 200 La. 301, 315).

All the allegations of fact made in the complaint or added or alluded to in petitioner's counsel memorandum and in her petition here are of failure to exercise proper care under the circumstances of the work done by the petitioner's husband.

Negligence of the employer, regardless of the degree, has never been held to "vitiate" the exclusiveness of the compensation remedy under exclusiveness provisions such as in the Louisiana Act. Cases to show that were cited in respondent's memorandum to the trial court which appears in the record (pp. 12-14 of the transcript as printed for the Court of Appeals). We have found no cases in Louisiana, or elsewhere under exclusiveness provisions similar to the Louisiana provision, to the contrary. Neither has petitioner's counsel. The one supporting case cited in petitioner's memorandum to the trial court was reversed on appeal (respondent's supplemental memorandum, transcript pp. 23-27, as printed for the Court of Appeals).

It is only in assault cases, personal assault by the employer on the employee, that the exclusiveness of the workmen's compensation remedy has been held not to apply. The reasons given for this exception vary, but basically it is the unconscionableness of allowing the employer to use the compensation statute as a shield to protect himself against his own personal intentional act. (See Malone, *La. Workmen's Compensation*, 1955 Pocket Part, Section 361, and Larson *The Law of Workmen's Compensation*, Section 68.11). Even this avoidance

of the exclusiveness of the workmen's compensation remedy in employer personal assault cases has not been followed in the one Louisiana case in which it was raised. In *Smith v. Bankston*, 75 So. (2d) 880 (1954), the Louisiana First Circuit Court of Appeals denied recovery in tort for an employer assault holding workmen's compensation to be the exclusive remedy.

Two Louisiana cases are cited by petitioner in her counsel's argument that the substantive law of Louisiana permits this action to be brought, *Clark v. Southern Kraft Corporation*, La. App., 200 So. 489, and *Faulkner v. Milner-Fuller, Inc.*, La. App., 154 So. 507.

Each of these cases involved allegations which tended to show incurrence of disability by employees from occupational disease. At the time of the decisions there was no coverage for occupational disease as such in the Louisiana Workmen's Compensation statute. The question discussed in each opinion is the coverage of the Workmen's Compensation Act as applied to allegations of progressive injury; whether or not there was an accident within the meaning of the compensation statute. The decisions have no application to this case. Petitioner is not claiming that there was no accident within the meaning of the Louisiana statute. It is clear that there was such an accident.

Petitioner's fraud approach was suggested by two Louisiana cases which petitioner here notices under the discussion in the petition of the tests applied to the complaint by the Fifth Circuit. The cases are *Brooks v. American Mutual Liability Ins. Co.*, 7 So.2d 658, and *Boyd v. American Mutual Liability Ins. Co.*, 11 So.2d 102. *Brooks* was an action for

damages and in the alternative for workmen's compensation for the death of plaintiff's husband. The employment was in a sugar factory. The allegations were much the same as here —that the employee unknowingly worked under unsafe conditions and the concealments of the hazards by employer vitiated the implied consent of her husband to the application of the Louisiana Workmen's Compensation Act. The case was dismissed on an exception of no cause of action based on the exclusiveness of the workmen's compensation coverage. The court remarked that "assuming for the sake of argument" an employer could be guilty of such fraud as would prevent coverage by the compensation act, no such fraud was alleged.

The *Boyd* case followed *Brooks* and made a similar assumption.

Petitioner has seized on the assumption in these two cases and claims to have here alleged fraud. As we have discussed above and as fully brought out in the opinion of the Fifth Circuit in this case, what petitioner has done is to allege negligence and from such allegations has attempted to draw a conclusion of fraud.

It is significant, however, that petitioner does not cite a single case where even a specific allegation of employer fraud, a designed, intentional deceit, has been held to take an employee's claim out of the exclusiveness of the compensation coverage. The only decision we have been able to find which appeared to involve such a specific allegation reached an opposite result. In *Greenwalt v. Goodyear Tire and Rubber Co.*, 164 Ohio State 1, 128 NE 2d 116 (1955), it was alleged that the employer had led the injured employee to believe the employer had filed the employee's application for compensa-

tion to the State Industrial Commission and the employee, because of the employer's act, did not discover the deception until the time limit for filing the application had expired. Despite the apparently clear allegation of deceit, the workmen's compensation remedy was held exclusive.

We respectfully submit that petitioner has not shown that this claim would be permitted by the substantive law of Louisiana.

III.

In Judging the Sufficiency of the Allegations of the Complaint, the Fifth Circuit Court of Appeals Applied the Criteria Embodied in the Federal Rules of Civil Procedure and Not the Tests Used by Louisiana Courts.

Petitioner argues at length that the Fifth Circuit, in judging the motion to dismiss, looked at the allegations of the complaint as a Louisiana court would do in passing on an exception of no cause of action instead of considering, as it should have, the Federal rule that a claim should not be dismissed unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

A quite sufficient answer is the last sentence of the opinion of the Court of Appeals, "We go further, therefore, and say that the plaintiff is not entitled to relief on the facts alleged in the plaintiff's briefs and on such facts as we can imagine within the framework of the complaint and consistent with the allegations and conclusions of the complaint."

Under Rule 8(a) of the Federal Rules of Civil Procedure,

it is still necessary, and obviously so, that the pleader must state a claim showing that the pleader is entitled to relief. "The pleadings must still state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief'." (Moore's Federal Practice, 2nd Ed., Vol. 2, Section 8.13, p. 1653)

The extended comparison in the petition of the Louisiana and Federal practice in judging the sufficiency of a complaint cannot disguise the fact that the petitioner has not stated a claim here which entitles her to the relief sought. Essentially, petitioner's entire position is predicated on the allegation of failure by the respondent to provide a safe place to work. The so-called fraud argument is but a projection of that allegation. The Fifth Circuit was correct, we submit, in saying that all of the facts which petitioner could possibly urge within the framework of the complaint were facts of negligence.

IV.

There Is No Seventh Amendment Question Involved.

For a Federal question, the petition advances the dismissal of the complaint on motion as a denial of the Seventh Amendment right to trial by jury. On this, the petition says, "In considering a motion to dismiss, if any facts that may be proved would entitle the plaintiff to relief, this amendment (the Seventh) requires a decision by a jury." This seems to be petitioner's whole argument on the applicability of the Amendment. Again, the short answer is the statement in the last sentence of the opinion of the Court of Appeals that there are no facts within the framework of the complaint which would entitle petitioner to relief. There can be no jury ques-

tion if there are no facts which would entitle petitioner to relief.

"The right (of jury trial) does not exist with respect to a complaint or declaration as to which dismissal or non suit is proper or with respect to facts as to which there is no traverse and as to which the defendant has defaulted." (31 American Jurisprudence, Verbo "Jury" Section 15, p. 22)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Einar B. Paust, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief on Petitioner by depositing same in the United States Post Office, air mail postage prepaid, addressed to the Honorable Warren E. Miller, Suite 1012, Barr Building, 910 Seventeenth Street N.W., Washington D. C., and Honorable H. Alva Brumfield, 205 American Bank Building, Baton Rouge, Louisiana, attorneys of record for Petitioner.

Dated this 10th day of July, 1959.

EINAR B. PAUST